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Supreme Court, U.S.
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No. -

In the

Supreme Court of the United States

OCTOBER TERM, 1991

STEVEN FARSACI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILIARLY SITUATED,
PETITIONER,

v.

GEORGE BUSH,
AS PRESIDENT OF THE UNITED STATES,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In reviewing a Motion To Dismiss as moot a complaint alleging a violation of Fifth Amendment Due Process, must a Court consider whether the dispute raises a genuine factual issue as to mootness which therefore precludes dismissal of the Complaint?

2. Is jurisdiction of a moot class action dispute maintained if it is "capable of repetition, yet evading review" as this principle is delineated in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974), without need of satisfying the dicta of Richmond Newspapers Inc., v. Virginia, 448 U.S. 555 (1980), commenting that the reviewed dispute was "short-lived by nature," or the principles of Weinstein v. Bradford, 423 U.S. 147 (1975), cases that were specifically decided as applying only in the absence of a class action?

3. Do genuine issues of material fact challenging the President of United States' claim for his Office of the right to declare war survive a Motion to Dismiss despite the reality of modern warfare that allows that Office to act so quickly that war is already a completed fact before there can be judicial review?

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REFERENCE TO COURT OPINIONS

A) This case was first brought in the United States District Court of the District of Maine C.A. No. 91-00010-P. On February 8, 1991 the Court sua sponte dismissed the Petitioner's Complaint as moot. Appendix at A-8.

B) The case was appealed to the United States Court of Appeals for the First Circuit, No. 91-1223, and Judgment was affirmed on July 31, 1991 pursuant to Local Rule 27.1 by Order of Court. Appendix at A-1.

C) On November 7, 1991 the Court of Appeals denied a petition for rehearing. Appendix at A-10.

D) There are no official or unofficial reports of opinions.

GROUNDS OF JURISDICTION

A) The petitioner seeks review of an affirmance by the First Circuit Court of Appeals entered on July 31, 1991, of the Judgment of the United States District Court for the District of Maine. The petitioner had appealed the District Court's allowance of a sua sponte Motion to Dismiss.

B) Petition for re-hearing was denied on November 7, 1991.

C) Jurisdiction is conferred on this Court by Article III of the Constitution of the United States and by United States Code chap. 28 § 1257. Review is sought pursuant to Supreme Court Rule 10.1(c) allowing review: "When a State Court, or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

CONSTITUTIONAL PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES

Article I, §8, Clause 11

The Congress shall have power...

To declare war, grant letters of marque and Reprisal, and make Rules concerning captures on land and water.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or natural forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without Due Process of law; nor shall private property be taken for public use, without just compensation. (emphasis added)

STATEMENT OF THE CASE

The Petitioner Steven Farsaci individually and on behalf of all others similarly situated, filed on January 8, 1991 a Complaint in the United States District Court for the District of Maine challenging as a violation of the Fifth Amendment to the Constitution of the United States the Defendant/Appellee President George Bush's de facto declaration of war on Iraq. The Petitioner by affidavit indicated that he was morally opposed to the war yet without the required Due Process protection had his well-being and the well-being of his family and friends placed in danger and forced to suffer the detrimental economic effects of war. On February 8, 1991, the Plaintiff's Complaint was dismissed as moot. This Decision was based on Congress accepting on January 12,

1991 as irreversible the de facto declaration of war upon Iraq. Appendix, at A-10. The Plaintiff's appeal to the United States Court of Appeals for the First Circuit argued that though request for injunctive relief may have been moot at the time under the strict standard for such relief, the District Court should not have dismissed his request for declaratory relief as the subject violation of Due Process is capable of repetition yet evading review. The first Order of Court of the Appeals Court applied the principles of Weinstein v. Bradford, 423 U.S 147 (1975) and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) to Petitioner's appeal and refused to consider whether the Petitioner's Complaint raised a genuine factual issue regarding mootness which would preclude a ruling on a Motion to Dismiss. Appendix at A-1.

The basis for jurisdiction in the

District Court was based on Federal Question Jurisdiction pursuant to 28 U.S.C. 1331.

The solitary and individual act of power by which the Defendant made the decision to declare war and his claim of right to have made this decision was delineated by Plaintiff's and Defendant's own exhibits admitted below. These can be summarized as follows.

After a meeting with Prime Minister Margaret Thatcher and a small group of advisors in the White House a few days after the Iraqi invasion, President Bush decided to deploy 125,000 troops to the Gulf, and he sent a letter to the Speaker of the House and the President pro tempore of the Senate stating that he does not believe involvement in hostilities is eminent, "on the contrary, it is my belief that this deployment will facilitate a peaceful resolution of the crisis." By the end of October 1990, the

escalation of troops in the mid-east had reached 200,000 troops and the President contemplated sending 100,000 more to the Gulf. By August 11, 1990, the United States had imposed a military blockade on Iraq, which included using force to intercept, stop, divert, and board ships in order to enforce the ban on Iraq of imports and exports and bar all items except medical supplies. As of November 15, 1990, the U.S. Defense Department had reported 3,680 intercepts by the allied forces, including 420 boardings and 16 ship diversions; 286 of the boardings were conducted by U.S. forces.

It was only after the troops had already been deployed that legislative leaders were informed of this fait accompli: "I was not consulted, I was informed of the buildup," stated Senator Sam Nunn of Georgia, Chairman of the Senate Armed Services Committee. "Last November, Nunn was not told about the U.S.

troop buildup in the Gulf until an hour before it was made public," reported Newsweek. As early as November 9, 1990, several Republican Senators said the Defendant should call a special session of Congress to approve the President's plans for military deployments in the Mid-East, but he rejected their request. By November 8, 1990, the Defendant "after consultation with King Fahd and our other allies" had already decided that an "offensive military option" was needed against Iraq, reported the Weekly Compilation of Presidential Documents.

Until January 12, 1991, when the United States was already set, planned, and prepared to start a military offensive in this de facto War, the President had received authorization from no one other than his own advisors and a foreign head of state to put the United States in such a state of war. As stated by several Senators, by the time the legislature gave any

type of approval to the President's acts, this approval did not a result from the Constitutionally required Due Process but was only an acceptance of an already completed fact; and even this was only achieved by a margin of five votes in the Senate. By the time Congress voted on January 12, 1991, "I think for better or worse we have crossed the Rubicon. The question is not whether or not we have a war, it is when," Senator Patrick Leahy. The publicity campaign in support of the war propagandized: support for the troops requires support for the war and any protest is unpatriotic. "I said last November and December we ought to have been dealing then when the policy was being formulated instead of coming in at the eleventh hour, let us not pull the rug out from under the President at this last moment," Senator Bob Dole.

Historically, such an absolute power over the life and death of the United States was

not intended to be held by the office of the Defendant. In June of 1784, it was the opinion of Congress that standing armies in time of peace are inconsistent with the principles of the Republican government and dangerous to the liberties of free people, that they generally are easily converted into destructive engines for establishing despotism. Military Heritage of America, 121 (R. Ernest and Trevor N. Dupuy, Hero Books, Fairfax, Virginia (1984)). The Congress therefore directed that the Continental Army after the Revolution be disbanded, maintaining only about one hundred officers and men to guard the armories at West Point and Fort Pitt. Id. Although President George Washington requested a regular and standing force, a well-organized militia that would be present throughout all the states, the establishment of arsenals throughout the states, and the establishment of military academies and special factories for military

armaments, he was not able to convince the Congress and it was not until the administration of Thomas Jefferson that such issues began to be taken seriously. Id., p. 119-20, 122.

Until after World War II, every significant military offense by the United States against a foreign power was founded upon a declaration of war by Congress: The War of 1812 declared on June 18, 1812; the Mexican War declared on May 13, 1846; the Spanish American War declared on April 25, 1898; World War I declared on April 6, 1917; World War II on December 7, 1991. See generally, War and Presidential Power: - a chronicle of congressional surrender (Thomas Eagleton, Liveright, N.Y., 1974); Who Makes War (Jacob K. Javits, William Morrow & Co., N.Y., 1973).

After World War II, beginning with the "police action" in Korea in which President Truman relied on the fact that American troops

were called into action as a part of the United Nations contingent and command, continuing into Vietnam in which the Executive derived authority from the Tonkin Gulf Resolution, the Defendant has now reached a point where he claims for the Executive the power for de facto declaration of war without any prior legislative authorization or notice. By the time the Defendant had received any type of congressional approval for his military actions he already had 400,000 troops stationed in an militarily offensive position against Iraq, a foreign power. These facts have caused the Defendant to gloat that he did not need the permission of the "smartalecks" in Congress or to "have to seek the permission of Sen. Kennedy or some liberal Democrats" to begin the "glorious history" of Desert Storm. This gloating is more consistent with a military oligarchy than a Republic whose Constitution does respect and require

permission of Congress.

Petitioner Farsaci's cause of action individually and as a class representative is that this declaration of war is a violation of Article I, Section 8, clause 11 of the United States Constitution and therefore the Fifth Amendment protection of Due Process. The Petitioner's primary injury is the imminent threat to his life and well being presented by modern 20th century warfare in which historically civilian casualties have grown from 5% of all war deaths to 75%. During the months preparing for the War with Iraq and during the War it was common for plane trips to be canceled for fear of terrorism, for government buildings to heighten their security measures against bombings, for local police and bomb squads to be on alert, and the fear of civilian casualties in the United States resulted in suspicion and police observation of Arabic tourist and visitors.

The second injury suffered by the petitioner is the direct and palpable injury of higher travel costs which is typical of the economic injury suffered by the class as a result of a state of war. Other economic injuries suffered by the class consist of restricted travel, lost business opportunities, loss of personnel to war-time reserve call-ups, reduced exports, and higher prices.

ARGUMENT

INTRODUCTION/SUMMARY

When looked at in a light most favorable to the Petitioner Farsaci and making all inferences in his favor, his cause of action states facts indicating a violation of the Due Process protection provided him by the Fifth Amendment and Article 1, §8, Clause 11 of the United States Constitution. The issue presented by his Complaint is reviewable only

within a limited set of circumstances: facts significant enough to be called a war, yet not so tremendous that judicial review would be impossible either because of the required discovery or because of political effects. The First Circuit Court of Appeals by failing to apply a properly understood "capable of repetition yet evading review" standard to its review of the Trial Court's dismissal of his Complaint has set a precedent that the abrupt nature of modern warfare shall strike from judicial review this important Due Process protection.

I. THE MATERIAL ALLEGATIONS OF PETITIONER FARSACI'S CAUSE OF ACTION STATE A CLEAR VIOLATION OF THE DUE PROCESS REQUIRED FOR A DECLARATION OF WAR.

In reviewing a Motion To Dismiss, "all inferences must be drawn against the movant... and in favor of the non-movant." Knight v. Mills, 836 F. 2d 659, 664 (1st Cir. 1987).

"[I]f under any theory" the Plaintiff states facts sufficient to state a cause of action, a Motion to Dismiss the Complaint must be denied. Id. All material allegations in the pleading must be excepted as true and the Complaint construed in favor of the non-moving party. Pujol v. Shearson American Express, 877 F. 2d 132, 138 (1st Cir. 1984).

A. Farsaci has standing to bring his ripe, justiciable claim before the Court.

Even in the early stages of this case without any discovery, the Court was provided with facts and statements indicating that Petitioner Farsaci has standing to bring the issue before the Court and that the issue presented by his Complaint is justiciable and ripe for review.

The harms asserted by the Plaintiff to establish standing are immediate, palpable and direct. The immediate threat to the

Petitioner's well being and the damages of increased fuel and travel costs and the economic privation directly resulting from a state of war are judicially recognized as sufficient for standing. E.g., Bowsher v. Synar, 478 U.S. 714, 721 (1986) (potential loss of cost of living increases are sufficient to challenge a legislative delegation of legislative power to the executive.); Diamond v. Charles, 476 U.S. 54, 65 - 66 (1986) (regulations having a direct financial impact on a physician's practice allow the physician to assert the constitutional rights of other individuals who are unable to assert those rights themselves); Lake v. Speziale, 580 F. Supp. 1318, 1333 (Conn. 1984) and cases cited (imminent injury or damages is sufficient to establish standing). The question of the specificity of the harms complained of are not properly addressed at this juncture, and should be

argued in a summary judgment motion. National Wildlife v. Burford, 835 F. 2d 305, 312 (DC Cir. 1987).

Certainly the harms complained of in this case when compared to the one upheld in United States v. SCRAP, 412 U.S. 669 (1973) stand scrutiny on the issue of standing within the parameters of a Motion to Dismiss. In SCRAP, the Court was asked by the Plaintiffs to uphold an "attenuated line of causation to the eventual injury," and did so. SCRAP, supra at 688. The Court emphasized that "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and wide spread government actions would be questioned by nobody." Id. at 688. The particular severity of the harm may not be great; a harmed interest, "if genuine, may be small - no more than an 'identifiable trifle'." Florida v. Weinberger, 492 F. 2d 488, 494 (5th

cir. 1974) quoting United States v. SCRAP, supra, 412 U.S. at 689, n. 14. A harm complained of need not be great, the cause need not be direct. National WildLife Federation v. Agricultural Stabilization and Conservation Service, 901 F. 2d 673, 676-77 (8th Cir. 1990).

The Petitioner has never requested a Court to step into an argument between the Executive and the Legislative branches. Both are centers of strong Governmental power that can take care of themselves. Nor has the Petitioner ever asked a Court to legally define war. During the process of appeal, the Defendant/Appellee admitted that he both started and ended a war. The Petitioner has only argued that the issue presented is justiciable because a Court can not be blind to a war already declared in fact by affecting "the technical ignorance to the existence of a war." The Prize Cases, 67 U.S. 635, 669

(1863); See, also, Mitchell v. Laird, 488 F. 2d 611, 614 (DDC 1973) ("the reference by a president to a military operation as war is indicative of a de facto state of war").

"An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that place and continued them in that dangerous posture." Laird, supra, 488 F.2d at 615. A congressman who may be wholly opposed to a war and the continuation of the war might vote for draft measures supporting that war because he is unwilling to abandon without support men already fighting. Id. A Court should not construe votes cast and acceptance of facts that cannot change "as though they are votes freely given to express consent." Id. "This Court cannot be unmindful of what every school boy knows: that in voting to appropriate money or draft men, a congressman is not necessarily approving of the continuation of a war, no

matter how specifically the appropriation or draft act refers to that war." Id.

This Court has always viewed with strong disfavor the notion that any case involving "political" rights is therefore non-justiciable. Baker v. Carr, 369 U.S. 196, 209 (1962). The Court has unequivocally stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Id. at 211; accord, Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 229-230 (1986). The Courts of the United States have routinely decided cases involving issues of foreign and defense policy. See, Dames and Moore v. Regan, 453 U.S. 654 (1981); Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952); United States v. Curtiss Wright Export Corporation, 299 U.S. 304 (1936). The Baker Court made it clear that the question of when a state of war begins and

ends were amenable to judicial resolution. Baker, supra, 369 U.S. at 212-214. Courts have historically made determinations about whether this Country was at war for the purposes of treaties, statutes and even insurance contracts. See e.g., New York Life Insurance Company v. Bennion, 158 F. 2d 260 (10th Cir. 1946). The judicial determination of a de facto state of war has occurred in the absence of official declarations of war by Congress. See,The Prize Cases, 67 U.S. 635 (1863).

The material facts of the Petitioner's Complaint show a declaration of war without any implicit or explicit authorization by Congress. Thus the issue of a citizen's Due Process protection against war cannot be any more ripe than it is in this case. The possibility that the Defendant will again enter this country into a de facto state of war without congressional approval is not

"imaginary or speculative." See Blum v. Yaretsky, 457 U.S. 991, 1000 (1982) (quoting from Younger v. Harris, 401 U.S. 37, 42 (1971)); see also Duke Power Company v. Carolina Environmental Study Group, Inc. 438 U.S. 59, 81-82 (1978) (although risk of a nuclear disaster was remote, question regarding validity of statutory indemnity coverage in an event of such a disaster was ripe for review)."

B. The material facts and inferences of Farsaci's cause of action indicate a declaration of war by the Defendant without congressional authorization.

The exercise of the war power granted by the United States Constitution is subject to the Fifth Amendment. E.g., Hamilton v. Kentucky Distilleries and Warehouse Company, 251 U.S. 146, 155 (1919). "The war power of the United States, like its other powers and like the police powers of the states, is subject to applicable constitutional

limitations." Id. and cases cited.

The Petitioner's Complaint involves the unambiguous language of Article 1, §8, Clause 11 of the Constitution which was written by the framers of the Constitution because they felt it unwise to entrust such a momentous power to involve a nation in war to the President alone. See The Federalist, No.75 at 506 (Alexander Hamilton, J. Cooke ed. 1961). "It should be difficult in a ... republic to declare war; but not to make peace." Justice Joseph Story, quoted in War and Presidential Power, supra at 27. Thomas Jefferson explained that he wanted "an effectual check to the dog of war." The Papers of Thomas Jefferson, 397 (J. Boyd ed. 1951). "Congress alone is constitutionally invested with the power of changing our position from peace to war." Thomas Jefferson quoted in Who Makes War, supra, at 273. James Wilson stated that he hoped the Constitution would guard against

hostilities being initiated by a single Executive. The Debates in the Several State Conventions on the Adoption of the Federal Constitution in 1787, 528 (J. Elliot, 2nd ed. 1836). Abraham Lincoln stated "no one man should hold the power of bringing" war upon us. The Collected Works of Abraham Lincoln, 452 (R. Basler ed. 1953).

II. THE COURT OF APPEALS MISAPPREHENDED THE "CAPABLE OF REPETITION, YET EVADING REVIEW" DOCTRINE AND IN CLEAR ERROR APPLIED AN INCORRECT STANDARD OF REVIEW TO THE DISMISSAL OF THE PETITIONER'S COMPLAINT.

Faced with the reality of the strict standard for obtaining injunctive relief, the Plaintiff was eventually forced to admit that his initial claim for injunctive relief was rendered moot by subsequent events. As a matter of practicality, once the legislature accepts a war already in progress, it is difficult for a Court to enjoin it.

This practical reality, however, makes the need for declaratory relief only more necessary and pertinent. This Court has provided a clear standard for when declaratory relief is necessary and is distinct from an advisory opinion: "[g]overnmental actions directly effecting, and continuing to effect citizens in our society" is not moot when an issue is "capable of repetition, yet evading review." Super Tire Engineering Company v. McCorkle, 416 U.S. 115, 126 (1974). Where a claim for injunctive relief is moot, a claim for declaratory relief should be considered separately on its merits, as it may well serve as an appropriate alternative to injunctive relief. See Steffell v. Thompson 415 U.S. 452, 463 (1974); Cleaver v. Wilcox, 499 F. 2d 940, 944 (9th Cir. 1974). Declaratory judgment is a form of relief which "should be liberally construed to provide its purpose of providing a speedy and inexpensive method of

adjudicating legal disputes without invoking coercive remedies and is not to be interpreted in a narrow or technical sense." Sherwood Medical Industries v. Decknatal Inc., 517 F.2d 724, 729 (8th Cir. 1975).

The First Circuit Court of Appeals never applied this clear standard to Petitioner Farsaci's Complaint. Rather it applied the principles of Weinstein v. Bradford, 423 U.S. 147 (1975) and dicta from Richmond Newspapers Inc., v. Virginia, 448 U.S. 555 (1983) and therefore concluded that since the challenged war is not short-lived by nature that Petitioner Farsaci's individual claim presents merely a hypothetical expectation. Appendix, A-6 to A-8. It then wented on to conclude that based on these principles, that authorities permitting class actions to proceed when the named plaintiff's claims were mooted for reasons that did not moot the claims of the class do not apply. Id.

The above principles as used by the First Circuit are clearly erroneous and should not have been the standard of review. Bradford specifically involved a cause of action in which class certification was denied and was decided "in the absence of a class action." Bradford, at 149. The "short-lived by nature" comment was dicta this Court used in Richmond Newspapers Inc. to refer to the short duration of the criminal trial that was reviewed. Richmond Newspapers Inc., at 563.

The application of this dicta to the pivotal case of McCorkle delineating the "capable of repetition yet evading review" doctrine as it applied to class actions would have mooted that case before the Court and this conceptualization of the doctrine was specifically rejected. That case involved a labor dispute and associated economic strikes. This Court noted that such strikes are comparatively of short duration but "[t]here

are exceptions." McCorkle, supra, at 126 and cases cited (emphasis added). This noted fact that such labor disputes are not short-lived by nature did not moot the class action before the Court in McCorkle.

The principles delineated by the Court in McCorkle clearly show that it is not a matter of whether the subject unconstitutional acts last enough to permit judicial review as stated by the First Circuit but whether the acts will be capable of review or evade review when repeated. "[G]overnmental Action directly effecting, and continuing to effect, the behavior of citizens in our society" is not moot when an issue is "capable of repetition, yet evading review." McCorkle, supra, at 126. The Defendant faces a heavy burden of establishing that there is "no reasonable expectation that the wrong will be repeated." United States v. W.T. Grant Company, 345 U.S. 629, 633 (1953) quoting United States v.

Aluminum Company of America 148 F. 2d 416, 448 (2nd Cir. 1945).

III. BY FAILING TO APPLY PROPER STANDARDS OF REVIEW, THE DISMISSAL OF THE PETITIONER'S COMPLAINT AS MOOT SETS PRECEDENT STRIKING FROM JUDICIAL REVIEW BECAUSE OF THE ABRUPT NATURE OF MODERN WARFARE A CLEAR VIOLATION OF THE DUE PRCCESS PROTECTION ABROGATING THE DEFENDANT'S CLAIM OF RIGHT FOR HIS OFFICE TO DECLARE WAR.

If the material facts of this Action are construed in favor of the Petitioner, there never occur the required Due Process Protection of Congressional authorization for the Defendant's declaration of war. The acceptance by Congress of an already declared war is not an authorization of that war nor satisfaction of the required Due Process.

This action on appeal presents the narrow question of whether the reality of modern warfare and presidential power will as a matter of law be allowed to strike from judicial review a violation of the clear

language of Article 1, §8, clause 11 of the United Constitution. This clause through the Fifth Amendment requires that the process of Congressional authorization occur to place the nation into a state of war. When the narrow question of this action on appeal is examined from the stand point of the substantive constitutional principle at stake, the need for controversy is clearly being served by the plaintiff in this action: the significant injuries involved provide standing to challenge the continuing claim of right by the Defendant to declare war, a right that the Judiciary can review through a long history of historical development, previous case law, and make a decision on the merits as to whether declaratory relief is necessary or proper. This action as viewed between the individual citizen and the federal government cannot be any more ripe than it is.

After petition for rehearing, the First

Circuit again failed to apply the "capable of repetition yet evading review" standard to the class action and simply concluded that the claims of all class members failed to satisfy the requirement of that principle because the sensation of hostilities against Iraq rendered the class claims moot, referring to its prior decision based on Bradford and Richmond Newspapers Inc. Appendix A-10 to A-11.

The issues presented by this matter are reviewable only within a limited set of circumstances: facts significant enough to be called a war yet not so tremendous that judicial review would be impossible either because of the required discovery or because of political effects. It is not a question of time but of fact allowing for judicial review. This case would not be any easier to adjudicate if the war against Iraq was still on-going with half a million American troops engaged in desert warfare and with all the

major countries of the world engaged in a political battle to resolve it. It is not any easier to engage discovery into a declaration of war whose duration is measured in months or years instead of days. A quick unconstitutional declaration of war responsible for the death of 200,000 people should not be passed over for review in order to wait for the occurrence of a longer unconstitutional war with greater casualties.

As the Appellee is quick to point out, this case obviously poses jurisdictional issues such as standing, political question, ripeness, and advisory opinion. However these are not substantive Constitutional protections or guarantees that the Court must be on guard to protect. They are judicially created means of ensuring the existence of a case-or-controversy as required by Article III of the United States Constitution. These means can be balanced and if necessary relaxed by the Court

when viewed against the potential harm of not reviewing the substantive issues presented. E.g., Abbot Laboratories v. Gardner, 387 U.S. 136, 149 (1967); Red Bluff Drive-in, Inc. v. Carol Vance, 648 F.2d 1020, 1033, n. 18 (1981) and cases cited.

The Fifth Amendment Right of Due Process within the context of the Bill of Rights serves as a "legal check [in the] hands of the judiciary ... a body, which if rendered independent ... merits great confidence for their learning and integrity." 14 The Papers of Thomas Jefferson 659 (J. Boyd ed. 1958). The Bill of Rights was intended to serve as an additional guarantee, other than the separation and division of powers, that government will "proceed in accord with settled rules of law." American Constitutional Law, 4-5 (L. Tribe, 2nd ed., 1988) (emphasis added).

The Appellee distorted the facts of

previous and pending case law in his arguments to dismiss this Action. The Appellant is only asking for a similar opportunity to engage in a factual dispute over whether declaratory relief is proper, something he cannot do because the Trial Court allowed the modern reality of warfare to moot his challenge to a continuing unconstitutional claim of right by the Defendant to declare war.

When the proper principles are applied to the specific historic facts of this case and to case law, it clearly demonstrates that the scenario played out in this conflict is capable of repetition and is likely to be repeated. The historical pattern indicates the Defendant's claim of right to declare war without even an implicit authorization by Congress. As seen with rapidly unfolding events in the Persian Gulf, this is a practice which could very likely evade review because of the transient and abrupt nature of modern

warfare. The Defendant acted so quickly during the subject matter of this action and upon such an absolute claim of right that not even the legislature of the United States was able to act quickly enough. Clearly this Plaintiff or any other Plaintiff having less power than the Congress will not be able to act powerfully or quickly enough to obtain relief from future violations of Constitutionally required Due Process for placing this Nation into a state of war.

CONCLUSION

This Court should issue a writ of Certiorari to the First Circuit Court of Appeals regarding Petitioner's Appeal.

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pro se attorney,

_____

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1223

STEVEN FARSACI,
Plaintiff, Appellee.

---

v.

GEORGE BUSH, AS PRESIDENT OF
THE UNITED STATES,
Defendant, Appellee.

Before

Torruella, Selya and Cyr,
Circuit Judges.

ORDER OF COURT

Entered July 31, 1991

ORDER OF COURT

Entered July 31, 1991

Plaintiff-appellant Steven Farsaci filed a class action complaint on January 8, 1991 against President George Bush seeking declaratory and injunctive relief to forestall

the use of military force against Iraq. Farsaci sued on behalf of himself and "all United States Citizens residing in the United States who are suffering the effects of the United States' state of war with Iraq." Farsaci requested a declaratory judgment that the President's alleged "de facto declaration of war against Iraq" without Congressional approval was unconstitutional and an injunction ordering the President "not to commence a military offensive against Iraq without congressional approval or unless necessary to defend an attack."

Four days later, on January 12, 1991, Congress passed joint resolutions authorizing the President "to use United States Armed Forces" against Iraq pursuant to United Nations Security Council resolutions. H. J. Res. 77, § 2(a), 102d Cong., 1st Sess., 137 Cong. Rec. H443 (Jan. 12, 1991); S. J. Res. 2, § 2(a), 102d Cong., 1st Sess., 137 Cong. Rec.

S403 (Jan. 12, 1991). The U.S. commenced hostilities on January 16.

On January 22, the district court sua sponte ordered Farsaci to show cause why the action should not be dismissed as moot. Farsaci responded by conceding that his request for injunctive relief was moot, but he asserted that insofar as he sought declaratory relief his claim was not moot because it was "capable of repetition yet evading review." On February 8, 1991, the district court dismissed the case upon finding that the Congressional resolutions had mooted the action and that the situation was not likely to recur in such a way as to evade review. Farsaci appealed. Subsequently, in early March 1991, hostilities ceased between the United States and Iraq.

There can be no question that Farsaci's objections to the President's allegedly committing United States troops without

Congressional authorization became moot when Congress provided the very authorization said to be lacking. Congress did not, as Farsaci claims, merely authorize draft call-ups or funding for unauthorized military action; the joint resolutions plainly authorized the President to use military force. Even if we were to accept, arguendo, claimant's assertion that the President before passage of the resolutions had acted unlawfully because of a lack of Congressional authorization, the resolutions still rendered the matter moot. See, e.g., Burke v. Barnes, 479 U.S. 361 (1987).

Even were there any doubt about this, the cessation of hostilities after the district Court's dismissal certainly renders the case moot at this time. See, e.g., Conyers v. Reagan, 765 F.2d 1124, 1127-29 (D.C. Cir. 1985) (termination of U.S. military action in Grenada rendered moot a challenge to the

constitutionality of the President's action).

Farsaci urges that his case nevertheless be adjudicated under the principle that a moot case may be justiciable if

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action against.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975). Application of this principle requires that the challenged action be too "short-lived by nature" to permit effective judicial review. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980). The challenged action here -- a war allegedly ordered by the President without required Congressional authorization -- could easily, if repeated, last long enough to permit judicial review of allegations such as Farsaci's. Conyers, supra, 765 F.2d at 1128 ("[u]ndeclared wars of aggression . . . are not inherently short in duration"). In

addition, Farsaci has presented no more than a purely hypothetical expectation that he would be subjected to the same action again.

Finally, there is no merit in Farsaci's suggestion that because his claims were brought on behalf of a class of similarly-situated persons, the action is somehow justiciable even if Farsaci's own claims are moot. The action is moot as to all members of the purported class for precisely the same reasons it is moot as to Farsaci personally: the allegedly unauthorized war received authorization and then terminated. Consequently, authorities that have permitted class actions to proceed when the named plaintiff's claims were mooted for reasons that did not moot the claims of the class, see, e.g., Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975), do not apply here.

Because we agree with the district court's dismissal of Farsaci's claims on

grounds of mootness, we -- like the district court -- need not discuss defendant's apparently very substantial objections that Farsaci lacks standing to bring his claims and that Farsaci's complaint raises a non-justiciable political question.

The judgment of the district court is affirmed. Loc. R. 27.1.

By the Court:

Clerk.

UNITED STATES DISTRICT COURT

No. 91-00010-P

STEVEN FARSACI,
Plaintiff, Appellee.

---

v.

GEORGE BUSH, AS PRESIDENT OF THE UNITED STATES,
Defendant, Appellee.

ORDER DISMISSING CASE AS MOOT

This Court entered its Order to Show Cause (Docket No. 6) on January 22, 1991, requiring counsel to show cause on or before February 1, 1991 why this matter should not now be dismissed as MOOT. Plaintiff's counsel filed on February 1, 1991 Plaintiff's Opposition to Sua Sponte Motion to Dismiss Plaintiff's Complaint as Moot (Docket No. 9). The Court has now carefully reviewed the entire file in this matter, including

Plaintiff's Opposition, and has reviewed the parties' written submissions on Defendant's Motion to Dismiss, filed on January 11, 1991 (Docket No. 4). The Court now FINDS that the matter is MOOT. The Court FURTHER FINDS that Plaintiff's request for declaratory relief is not demonstrated by the record made in this case to be either likely to reoccur or, should it do so, to be likely to evade timely review. The Court is satisfied that the Congress now having acted to invest the President with authority to utilize force in support of the enforcement of the United Nations Resolutions in Saudi Arabia, and the President having undertaken to do so, this matter is now MOOT.

Accordingly, Plaintiff's Complaint is DISMISSED.

GENE CARTER
Chief Judge

Dated at Portland, Maine this 8th day of February, 1991.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1223

STEVEN FARSACI,
Plaintiff, Appellee.

---

v.

GEORGE BUSH, AS PRESIDENT OF
THE UNITED STATES,
Defendant, Appellee.

Before

Torruella, Selya and Cyr,
Circuit Judges.

ORDER OF COURT

Entered July 31, 1991

ORDER OF COURT

Entered November 7, 1991

Appellant has filed a petition for rehearing of this court's order summarily affirming the district court's dismissal of Farsaci's class action as moot. We reject

Farsaci's assertion that this court in that order "misapprehended" the "capable of repetition, yet evading review" doctrine. Not only are the claims of all class members in Farsaci's case moot, the claims of all class members also fail to satisfy the requirements of the "capable of repetition, yet evading review" doctrine for the reasons stated in this court's order. See Conyers v. Reagan, 765 F.2d 1124, 1128-29 (D.C. Cir. 1985).

In addition, because the cessation of hostilities against Iraq rendered the class claims moot, id. at 1127-28, we need not consider Farsaci's contention that he raised a genuine factual issue precluding a ruling on a motion to dismiss that the congressional resolutions rendered the claims moot.

The petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: _____
Chief Deputy Clerk